IN THE

Supreme Court of the United States

October Term, 1970

NO. 70-256

TOMAS AGUIRRE, JR., APOLINAR COMPEAN,
and WILHELM SEAFOODS, INC.,
Petitioners

v.

CITIZENS CASUALTY COMPANY OF NEW YORK,
Respondent

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For
The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Counsel of Record

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RESPONDENT'S BRIEF IN OPPOSITION

Citizens Casualty Company of New York, Respondent, says that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, heretofore filed in this cause, should be denied, and would show the Court as follows:

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas, Brownsville Division (Petitioners' Appendix, pages 7-11) is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix, pages 12-19) is not officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioners' breach of the express warranty of continuing seaworthiness, contained within the policy of marine hull insurance in question, suspended coverage under such policy and relieved Respondent of liability for the damages to Petitioners' vessel resulting from its grounding.

STATEMENT

The facts of the case are stated fully in the decision of the United States Court of Appeals for the Fifth Circuit (Petitioners' Appendix, pages 12-19).

ARGUMENT

1. The Petition is frivolous and without any merit. The decision of the Fifth Circuit is obviously correct, involves no conflict of opinion with either the United States Supreme Court or other United States Courts of Appeal, and presents no other basis for review by this Court. The District Court's finding that, at the time of the loss the vessel was seaworthy, was found and held by the Fifth Circuit to be clearly erroneous. The Fifth Circuit found

both that the vessel was unseaworthy and ". . . that this unseaworthiness and the grounding were causally connected." (Petitioners' Appendix, page 19.) Petitioners do not even question the Fifth Circuit's finding of unseaworthiness nor do they even mention that Court's further finding with regard to the obvious causal connection between the unseaworthiness of the vessel and the grounding.

Under this state of affairs, it is clear that the "questions presented" by Petitioners are merely academic. Had the Fifth Circuit adopted Petitioners' legal rationale, i.e. that Petitioners' claim could be defeated *only* by a finding that the unseaworthy condition contributed to the grounding, the ultimate outcome of this case would have been the same. The Fifth Circuit made the very findings Petitioners would require as a prerequisite to the establishment of non-liability on the part of Respondent; yet, Petitioners do not even question such findings, upon which Respondent would still be entitled to a favorable judgment, even in the event this Court granted the Petition and adopted Petitioners' legal theories.

The Supreme Court of the United States should not be asked to take action both futile and frivolous.

Turning, however, to the "reasons" presented by Petitioners for granting their Petition, we find that two are stated: (1) The Fifth Circuit's decision conflicts with *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 1955, 348 U.S. 310, and (2) Judicial interpretation of warranties in marine insurance policies is difficult and confusing. Petitioners' "reasons" will be briefly considered.

2. The decision of the Court below does not conflict with *Wilburn Boat*. It is important to remember that *Wilburn Boat*, supra, involved alleged breaches of

printed policy terms or "warranties" providing that, without written consent of the Company, the boat could not be sold, transferred, assigned, pledged, hired or chartered, and must be used solely for private pleasure purposes. The policy in question was a marine *fire* insurance policy, and the claim was for damage to the vessel as a result of a *fire*. The concept of "seaworthiness" played no role in *Wilburn Boat,* supra.

Declining to hold that ". . . every term in every maritime contract can only be controlled by some federally defined admiralty rule", 348 U.S. at 313, the Supreme Court held that there was no "judicially established federal admiralty rule governing *these* warranties", 348 U.S. at 314, and that ". . . the scope and validity of the policy provisions *here involved* and the consequences of breaching *them* can only be determined by state law. . ." 348 U.S. at 316.

With the foregoing in mind, it is clear that the decision below is no more in conflict with *Wilburn Boat,* supra, than was *Kossick v. United Fruit Company,* 1961, 365 U.S. 731, involving the question of whether a judicially established federal admiralty rule governed an alleged oral agreement between a seaman and a ship owner respecting maintenance and cure. Holding *Wilburn Boat,* supra, "apposite", the Supreme Court pointed out that: "The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing *the matter there presented. . .*" 365 U.S. at 742.

Following the third trial, the Fifth Circuit in *Wilburn Boat Company v. Fireman's Fund Ins. Co.,* 5 Cir., 1962, 300 F.2d 640, cert. den., 370 U.S. 925, correctly pointed

out that the Supreme Court ". . . merely held that state law is to be applied in the field of marine insurance only where 'an entrenched federal precedent is lacking' with respect to a specific issue. This is the interpretation which the Supreme Court itself and the Court of Appeals for the Second Circuit has placed on that decision. See Kossick v. United Fruit Company, 365 U.S. 731, 742, 81 Sup. Ct. 886, 6 L.Ed. 2d 56, and Purofied Down Products Corp. v. Travelers Fire Ins. Co., 278 F.2d 439, 441 n. 1." 300 F.2d at 647 n. 12. The Fifth Circuit went on to determine that "Nothing is better established in the field of *marine* insurance than that a mistake or commission material to a marine risk, whether it be willful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy", 300 F.2d at 646. The Court found such rule to be ". . . solidly entrenched in our body of federal maritime law (see e.g., McLanahan v. Universal Insurance Company, 26 U.S. 170, 7 L.Ed. 98, 185), . . . (and that it) . . . should apply in the instant case." 300 F.2d at 647 n. 12.

Likewise, in *Gulf Stream Cargo, Ltd. v. Reliance Insurance Company,* 5 Cir., 1969, 409 F.2d 947, the Fifth Circuit determined that concealment of a vessel's unseaworthy condition at the time of the inception of the policy, and the consequent breach of the warranty of seaworthiness implied in the A.I.T.H. Time Policy therein involved, would, under firmly entrenched general maritime legal principles, result in "avoidance" or "suspension" of the marine hull policy in question. 409 F.2d at 980, 981, 983.

Thus, under the foregoing authorities, it is clear that the court below followed and applied the Wilburn Boat doctrine in first determining that the particular warranty

involved in the instant case was governed by long-established, federally defined, admiralty rules. In this regard, we shall see that the court below was entirely correct.

3. The seaworthiness standard, and its conceptual role in marine insurance, is solidly entrenched in federal maritime jurisprudence. Standing in obvious contrast with the relatively immaterial and technical "warranties" involved in *Wilburn Boat,* supra, the seaworthiness standard has been an important concept of federal maritime jurisprudence for generations. As stated by the Supreme Court in *Mitchell v. Trawler Racer, Inc.,* 1960, 362 U.S. 539, 80 Sup. Ct. 926: "The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. They were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which otherwise would result in a forfeiture of their right to wages. See Dixon v. The Cyrus, 7 Fed. Cas. page 755, No. 3,930; Rice v. The Polly & Kitty, 20 Fed. Cas. page 666, No. 11,754; The Moslem, 17 Fed. Cas. page 894, No. 9,875. The other route through which the concept of unseaworthiness found its way into the maritime law was via the rules covering marine insurance and the carriage of goods by sea. The Caledonia, 157 U.S. 124, 15 S.Ct. 537, 39 L.Ed. 644; The Silvia, 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed. 241; The Southwark, 191 U.S. 1, 24 S.Ct. 1, 48 L.Ed. 65; I Parsons on Marine Insurance (1868) 367-400." 362 U.S. at 544, 80 Sup. Ct. at 929, 930.

Over the decades, federal maritime jurisprudence has come to recognize two distinct classes of warranties of seaworthiness in marine hull insurance policies, to each

of which has attached various predictable and established rules and doctrines. In this regard, it is important to distinguish between express warranties of continuing seaworthiness, such as the one contained in the policy in question, written on a 1962 AHAB form, and the rather limited implied warranty of seaworthiness judicially grafted to those forms of marine insurance policies which are completely silent on warranties of seaworthiness. In cases involving the latter, the "American Rule", *Union Insurance Company of Philadelphia v. Smith,* 124 U.S. 405, 8 Sup. Ct. 534, 31 L.Ed. 497, implies for a time policy (which is silent on warranties of seaworthiness) a warranty of seaworthiness as of the very moment of attachment of the insurance. "And, unlike the English Rule which limits the warranty to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative, that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." *Saskatchewan Government Ins. Office v. Spot Pack,* 5 Cir., 1957, 242 F.2d 385, 388. See also *Tropical Marine Products v. Birmingham Fire Insurance Company of Pennsylvania,* 5 Cir., 1957, 247 F.2d 116, 119. As the Fifth Circuit noted in *Spot Pack,* supra, the consequences of a violation of the limited warranty of seaworthiness implied under the American Rule is ". . . merely a denial of liability for loss or damage caused proximately by such unseaworthiness." 242 F.2d at 388.

In contrast, an express warranty of continuing seaworthiness (such as the one contained in the policy in question) amounts to a ". . . running, continuing obligation . . . a breach of (which) . . . voids the policy altogether. . ." *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir., 1957, 242 F.2d 385, 388, 391. Or, as the court below correctly stated: "The inescapable conclusion remains that the vessel was unseaworthy when she ran aground. Consequently the Owners' breach of their express warranty of seaworthiness suspended coverage under the insurance policy. . . The insurer cannot be liable for damage suffered while coverage was suspended. . ." (Petitioners' Appendix, page 18). The above-mentioned *strict* rule, which is applicable to the owners' breach of an express warranty of continuing seaworthiness, is a solidly entrenched, judicially established, federal admiralty doctrine of long standing. See *Gulf Stream Cargo, Ltd. v. Reliance Insurance Company*, 5 Cir., 1969, 409 F.2d 974, 983 n. 28; *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Company*, 5 Cir., 1957, 247 F.2d 116, 122-23, cert. den. 355 U.S. 903; *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir., 1957, 242 F.2d 385, 388; *Continental Insurance Company v. Patton-Tully Transportation Company*, 5 Cir., 1954, 212 F.2d 543; *Ideal Cement Company v. Home Insurance Company*, 5 Cir., 1954, 210 F.2d 937. Contrary to Petitioners' contentions, these rules are not confusing or difficult.

4. Policy considerations. The O/S MISS ESMERALDA customarily fished in the Gulf of Mexico, whose waters lapped the shores of five states of the United States as well as two independent nations, the Republics of Mexico and Cuba, respectively. The policy in question

was issued at Jacksonville, Florida, by a New York insurance company in favor of Texas assureds. (App. 13-14). The vessel grounded on the Texas coast, although this could just as easily have occurred on the coasts of Mississippi or Mexico. Obviously, legal rules respecting warranties of seaworthiness in marine hull insurance policies have been, are, and must be uniform, and controlled by one law. As stated by the Supreme Court in *Kossick v. United Fruit Company,* supra: ". . . this is such a contract as may well have been made anywhere in the world and . . . the validity of it should be judged by one law wherever it was made." 365 U.S. at 741.

In dealing with the seaworthiness standard, a concept fundamental to maritime operations, the need for a uniform rule is both clear and great. Shippers and vessel owners must know how to handle their vessels and cargo, respectively, to preserve their insurance. Insurers must know the risks they are assuming when they write policies and fix premium rates. For all of these reasons, it is obvious that the court below was correct in applying solidly entrenched federal maritime legal principles in disposing of the matter in issue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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PROOF OF SERVICE

I, Gordon L. Briscoe, attorney for the Respondent herein and a member of the Bar in the Supreme Court of the United States, hereby certify that on the 6th day of ~~July~~ Aug 1971, I served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari on Mr. John Wm. Black, Esq., Post Office Box 953, Brownsville, Texas 78520, by mailing the same in a properly addressed envelope with postage prepaid.

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